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A layman as Attorney-General

Nilay B Patel, Los Angeles, critically analyses the appointment of the Hon Dr Michael Cullen as Attorney-General

On 20 December 2004, the Prime Minister announced the appointment of the Hon Dr Michael Cullen as the successor to the Hon Margaret Wilson as Attorney-General, effective on 28 February 2005. The Prime Minister also announced, in what can be seen as an act of necessity, the appointment of Russell Fairbrother MP as a Parliamentary Private Secretary to the Attorney-General.

The Attorney-General appointee has aroused criticism for his lack of legal credentials. (Under s 55(1)(e), Law Practitioners Act 1982, experience as a member of Parliament is "legal experience" but only for the purposes of commencing practice as a solicitor on one's own account.)

In what can tenably be interpreted as an act of justification of this appointment, the Attorney-General delivered an address to the Legal Research Foundation wherein he sought to discount the need for legal qualifications. ("The Courts, Government, and the Role of the Attorney-General", Legal Research Foundation, 25 May 2005.) This article posits the view that admission to the Bar must be a necessary prerequisite for an appointment as Attorney-General and is no more critical than in the current Clark ministry.

THE "PRECEDENT"

Cullen notes as a "precedent" the Rt Hon George William Forbes, Attorney-General from 1933 to 1935. A one-time occurrence 72 years ago for an office first filled in 1856 hardly qualifies as a persuasive model for departing from national and international tradition centuries in the making. To probe this "precedent" a little further, the immediate past Solicitor-General remarked that Forbes "was of the view there was no lawyer suitable for the office in the ranks of the parliamentary party supporting the government". (McGrath QC "Principles for Sharing Law Officer Power — the Role of the New Zealand Solicitor-General" (1998) NZULR 197, 204.) This point is further exemplified by Cullen's use of the recurring cast of non-lawyer Attorneys-General in Tasmania "where there is a small legislature and often no lawyer to fill the role of Attorney-General". However, among the current parliamentary membership of governing parties, the Prime Minister had an opportunity to appoint David Parker or Russell Fairbrother of the Labour Party and the Hon Matt Robson (an experienced former Minister of the Crown with law portfolios). The Coalition Agreement Between the Labour and Progressive Coalition Parties in Parliament provides that the Progressive Coalition will have one Cabinet position; but Mr Robson could be Attorney-General outside Cabinet, as was the Rt Hon David Lange.

THE SACREDNESS OF THE LAW

Cullen continued "I cannot accept that admission to the Bar confers some kind of sacred knowledge that cannot be acquired any other way". It cannot be acquired in any other way in a way required for the Attorney-Generalship. The Attorney-General is the principal legal adviser to the government and is responsible for ensuring government is conducted in accordance with the law. One specific aspect of this role is to act as an advocate for the government in the Courts for, during the 1990s alone,

> successive Attorneys-General have led New Zealand's legal teams in an international arbitration against another State and before the International Court of Justice ... [and have] also appeared as counsel at all levels, including in the Privy Council ... (McGrath at p 215).

It is trite therefore that the Attorney-General may, at his or her discretion, appear personally in cases of exceptional gravity or great public importance either nationally or internationally. The yardstick is not the "sacredness" of legal knowledge: it is admission to the Bar. Where the Attorney-General is named as a party in litigation, a non-lawyer Attorney-General appearing for the government would appear quaint and faintly absurd at best.

LEGAL ADVISER IN CABINET

The Attorney-General provides legal advice to the Cabinet and Cabinet committees. The function of providing legal advice, in essence, involves the "practice of law", a term with a broad and non-specific definition.

McGrath emphasises the importance of the role played by the Attorney-General as legal adviser in the Cabinet and Cabinet committees. (p 215) The Prime Minister predicted that Russell Fairbrother will use his "skills and expertise to support [the Attorney-General's] portfolio and administrative work". Cabinet convenes and deliberates under its exclusive membership, shrouded in confidentiality. A difficult situation would arise if legal advice were sought as a matter of urgency at the Cabinet or at one of its committees. Fairbrother is neither a minister of the Crown nor a member of Cabinet and may not be privy to the many issues before it upon which legal advice is sought. If resolution of Cabinet issues is delayed for want of legal insight, then the machinery of government may become very inefficient.

Furthermore, the entire current executive branch of government (Cabinet and all ministers outside Cabinet) includes no minister with legal laurels. As a consequence, none of the eight Cabinet committees contains lawyers. (Unlike Cabinet, officials may be invited to attend Cabinet committees to assist ministers if the committee wishes.) Had any other Cabinet minister been a lawyer, the gravity of the Cullen appointment may have been mitigated to some extent, as that minister could have acted as an unofficial constitutional invigilator.

The Attorney-General's role as adviser also extends to encouraging ministerial colleagues to seek appropriate legal

advice in the course of government decision-making. This form of proactive advisement would require legal qualifications as the Attorney-General would need to identify areas which may attract legal controversy of futuristic import. The Attorney-General would need to be familiar with possible causes of actions at law on issues before Cabinet or Cabinet committees in order to encourage further legal advice.

A misguided analogy is drawn by Cullen when he further states that "those who propound it [lawyer as Attorney-General] ought, by analogy, to object to the election of anyone who is not a health practitioner to the role of Minister of Health". The Office of Attorney-General is unique among ministerial portfolios and is not open to such comparison. As described by the Ontario Attorney-General's Office, "the responsibilities stemming from this role are unlike those of any other Cabinet member. The role has been referred to as 'judicial-like' and as the 'guardian of the public interest'". (See www.attorneygeneral.jus.gov.on.ca/english/about/ag/agrole.asp.) That the analogy is misguided can best be appreciated by the Attorney-General's proper exercise of discretion to appear personally in Court. The Attorney-General is also deemed the leader of the legal profession. The Minister of Health, however, does not participate in surgical procedures as minister for example, nor is he or she considered the head of the medical profession.

BILL OF RIGHTS ACT

Cullen considers his reporting duties pursuant to the New Zealand Bill of Rights Act 1990 and states that:

> there are functions that the Attorney-General cannot delegate, and where legal knowledge is necessary. One such function is the reporting by the Attorney-General to Parliament when a Bill appears to be inconsistent with the ... Bill of Rights Act 1990. However, the Attorney-General is supported by the Solicitor-General. Section 9A of the Constitution Act 1986 provides that the Solicitor-General may perform a function or duty imposed, or exercise a power conferred, on the Attorney-General.

The Constitution Act is of little relevance in the discharge of this duty. The Attorney-General has a right of audience in Parliament as a member of Parliament. The politically independent Solicitor-General appointed singularly as a public servant, cannot perform that duty.

Though this is a non-delegable duty, this is one role where, contrary to Cullen's belief, legal knowledge may not be necessary. The *Cabinet Manual* provides the following concession: "[t]he Ministry [of Justice] must be consulted on all Bills, so it can vet them for consistency with the ... Bill of Rights Act 1990". (Cabinet Office, Wellington, 2001, para 5.21.) More directly, the "Ministry of Justice is responsible for examining all legislation for compliance" with the Bill of Rights Act. (para 5.39. Bills developed by the Ministry of Justice are examined by the Crown Law Office) The Attorney-General, under s 7 of the Bill of Rights Act, is required to draw the attention of the House to any Bill that appears to be inconsistent with the Bill of Rights Act.

ATTORNEY-GENERAL/SOLICITOR-GENERAL

Tensions and difficulties are also created between the Attorney-General/Solicitor-General hyphenation with a non-lawyer Attorney-General. Although the Solicitor-General is empowered to perform the Attorney-General's role (s 9A, Constitution Act 1986), this should not be interpreted as meaning the Solicitor-General is or can be the de facto Attorney-General. The Solicitor-General only assists or supports the Attorney-General but that itself has its working limitations since, as with a parliamentary private secretary, he or she also has no right of audience in Cabinet or Parliament. Further, as McGrath points out, "the Solicitor-General must willingly accept that when the Attorney-General elects to advise the government on the law, that opinion will override any given by the junior Law Officer". (p 214) It would be a disturbing result indeed if a non-lawyer Attorney-General were to embark upon that course of action.

TITULAR SIGNIFICANCE

There is much to be said about the titular significance of certain high offices. Elementarily, the title "Attorney-General" necessarily implies the holder to be a lawyer. Although the roles may differ, all 80 past and present US Attorneys-General have been lawyers. Similarly, all 17 past and present US Surgeons-General have been medical doctors. However, many Secretaries of Health and Human Services (equivalent to the Minister of Health) have not been and are not required to be.

The importance of titular significance is no better exemplified than in the Law Practitioners Act 1982 which provides for an offence where any person "takes or uses any name, title, addition, or description implying or likely to lead any person to believe that he is qualified to act" as a lawyer. (s 64(1)(c), Law Practitioners Act 1982) Whether a non-lawyer Attorney-General in New Zealand would contravene any part of the Law Practitioners Act is outside the ambit of this article and may never have been jurisprudentially explored.

Cullen further submits "that there is a danger in becoming obsessed with form over function". No such obsession exists in the abstract. Due recognition must be granted however, that the function demands the form.

CONCLUSION

In conclusion, a non-lawyer Attorney-General:

- may not command the respect or confidence from the legal profession or the public to the extent forthcoming with a lawyer-appointee;
- may raise questions about the precise parameters of necessary credentialism among the upper echelon of the legal fraternity in New Zealand;
- would be placed under troubling limitations in participation in legal forums such as the Rules Committee which has responsibility for procedural rules in the Supreme Court, Court of Appeal, High Court, and the District Court. The Attorney-General is the ex officio member of the Committee and in the past, each Attorney-General has usually attended at least once upon assuming office. The Committee considers complicated procedural measures which can only be appreciated by a qualified lawyer; and
- may almost be mandatorily obliged to consult the Solicitor-General in issues purely legal where this has traditionally been discretionary. (See for example, *Cabinet Manual 2001*, para. 2.103, relating to conventional rules for litigation involving ministers.)

Future Prime Ministers must recognise these raw realities and, in their wisdom, desist from such controversial appointments. ❐